IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 30TH MAY 2007 / 9TH JYAISHTA 1929

WP(C).No. 12872 of 2007(G)

PETITIONER:

DR. SANDHYA RAM,
"LAKSHMI", ERANHOLI, THALASSERY.

BY ADV. SRI.NAVEEN.T

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY
THE SECRETARY TO GOVERNMENT, HEALTH AND FAMILY
WELFARE DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DIRECTOR OF HEALTH SERVICES,
THIRUVANANTHAPURAM

***ADDL. RESPONDENTS IMPLEADED .**

3. DR.DEEPAK.S, S/O.M.SUGUTHAN,
MUTHUKANDATHIL, PANANCHERY LANE,
KOORKANCHERY, TRICHUR.

4. DR.UDAYESAN C.N., S/O.NANU,
CHERAYIL HOUSE, KUTTIPURAM, MALAPPURAM.

*** ARE IMPLEADED AS ADDL.R3 & R4 AS PER ORDER DT.2.5.07 IN IA.5966/07.**

BY ADV. SRI.K.I.MAYANKUTTY MATHER
SMT.S.LAKSHMY
BY GOVERNMENT PLEADER SMT.ANU SIVARAMAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30/05/2007, ALONG WITH WPC NO. 14927 OF 2007 WPC NO. 15212 OF 2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.12872/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE PROSPECTUS FOR ADMISSION TO MEDICAL P.G.DEGREE/ DIPLOMA COURSES- 2007 ISSUED BY THE GOVT.

EXT.P2:- COPY OF THE PROVISIONNAL LIST PUBLISHED BY THE 2ND RESPONDENT.

EXT.P3:- COPY OF THE REPRESENTATION FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.

EXT.P4:- COPY OF THE FINAL LIST PUBLISHED BY THE 2ND RESPONDENT.

RESPONDENTS EXHIBITS

EXT.R3(a):- COPY OF THE SELECT LIST OF THE SERVICE CANDIDATES.

/TRUE COPY/

tss

S.SIRI JAGAN, J.

W.P.(C).Nos.12872,14927 & 15212 of 2007

Dated this the 30th day of May, 2007

JUDGMENT

In all these three writ petitions petitioners are applicants for admission to the Post Graduate Courses in Medical Colleges in Kerala. They are employed in the Health Services Department. There is a quota set apart for doctors in the Health Services Department for the purpose of admission to Post Graduate Course. The petitioners have also applied for admission to the quota prescribed for Health Service candidates. However, their applications are not being considered on the ground that their probation in service has not been declared and therefore they are not eligible for admission in view of clause VII(a)(4) of the prospectus for admission to Medical Post Graduate Degree/Diploma Courses 2007 issued by the Government of Kerala. They are challenging the said clause as discriminatory on the ground that in the quota prescribed for Assistant Surgeons there are three categories viz. Health Service quota, Leprosy Service Quota and Tuberculosis Service quota and the prescription regarding declaration of probation is made applicable to Health Service Quota candidates

alone whereas the same is not applicable to Leprosy Service quota and Tuberculosis Service quota. They also contend that the service conditions of Lecturers in Medical Colleges, Medical Officers in Municipal Service and Medical Officers in Insurance Medical Service are also identical who also have separate quota prescribed under the very same prospectus for whom also the conditions of declaration of probation has not been made applicable. In the said circumstances, they challenge this clause as discriminatory and violative of the fundamental rights of the petitioners.

2. Respondents 1 and 2 have not filed any counter affidavit. Additional respondents in two of the writ petitions who are general merit candidates to oppose the writ petition since if the petitioners are not selected for admission, the same would go to general merit candidates.

3. The learned Government Pleader contends that the classification in the prospectus is made on the basis of a intelligible criteria and reasonable classification and therefore the same is not hit by Article 14 and 16 of the Constitution of India and therefore there is no merit in the contentions of the petitioners. Learned Government Pleader further submits that the prospectus was prepared by an expert body consisting of experts of the Medical Education Department and as

such the condition was incorporated taking into account all the facts and circumstances of the case. The learned Government Pleader particularly points out that in Health Services quota there is a large number of applicants whereas in other categories there are not that much applicants and therefore on that account also the classification is reasonable. Counsel for the additional respondents viz. General merit candidates also would support this contention. They would submit an additional contention which is also supported by the learned Government Pleader to the effect that the petitioners applied pursuant to Ext.P1 fully knowing about the above said clause and after they were found ineligible for admission they cannot turn round and challenge the clause itself on the principles of estoppel.

4. I have considered the rival contentions in this case. On the basis of the pleadings and arguments before me two issues arise for consideration. (1) Whether clause VII (a)(4) is arbitrary and discriminatory and violative of the fundamental rights of the petitioner. (2) Whether even assuming that it is discriminatory the petitioners can be allowed to challenge the said clause after having participated in the selection process in accordance with the prospectus itself.

5. For convenience I shall extract the relevant portion of clause VII hereunder:-

VII. Reservation of seats among service candidates.

All State quota seats other than those mentioned in clause VI are allotted to Service candidates. The seats are specified in Annexure III & IV.

Reservation for the service candidates includes four quotas

Lecturers
Assistant Surgeons -3 categories under this are
(a) Health Service quotas
(b) Leprosy Service quotas
Medical Officers in Municipal Service.
Medical Officers in Insurance Medical Service.

Seats as shown in Annexure III & IV are set apart for service candidates sponsored by each department.

(a) Eligibility for service quota.

1. The eligibility criteria laid down in clause IV(a) and (b0 are applicable for service candidates also. In clause IV (c) a relaxation is given to them in that for service candidates the upper age limit will be 47 years for P.G.Degree courses and 48 years for P.G.Diploma courses as on 30.4.2007.

2. For candidates under service quota total service will be reckoned as on 31.12.2006. Unauthorised absence or absence due to leave without allowance will not be counted for the purpose of calculating the seniority. Inter se seniority of actual physical service, excluding leave without allowance with acquirement of eligibility in the Entrance Examination will be the criterion for selection, if more than one candidate applies for the course and if the difference in their length of service is more than 90 days. If it is below 90 days, the PSC seniority will be the criterion. Period of leave without allowance will be deducted for determining the seniority.

3. Lecturers who have post graduate degree in the specialty concerned in which they are working will not be eligible for admission under service quota for another postgraduate course.

4. Applicants under Health Service quota should have had

> their probation declared to become eligible to apply for any of the service quota.
>
> 5. The Assistant Surgeon applicants can apply for the different quotas allotted to them; but they will be eligible for selection only under a particular quota.
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> x x x

restriction prescribed by the impugned clause in the prospectus is a reasonable classification also does not appeal to me in so far as separate quotas are prescribed for all these separate categories. Even if there are more applicants in the Health Service quota, only those number prescribed as per quota alone will get admission. As such I do not think that the prescription that the Health Services candidates alone should get their probation declared for becoming eligible for admission as unreasonable without having any nexus with the object sought to be achieved by the same. In this connection I also note that before the bifurcation of the Health Service and the Insurance Medical Service both the Assistant Surgeons of the Health Services and the Medical Officers in Insurance Medical Service formed one service which was later bifurcated into Health Services and Insurance Medical Services. As such there cannot be any difference between the Health Service Assistant Surgeons and Insurance Medical Officers. This is also another reason why the particular clause cannot be saved on the ground of reasonable classification. As such I am satisfied that sub clause 4 of clause VII(a) of the prospectus has to be struck down as violative of the fundamental right of the petitioners, the same being arbitrary and discriminatory. I do so.

7. Coming to the other contention regarding estoppel it is not

necessary to delve deep as fortunately the issue is directly covered by a decision of a Division Bench of this court in Thomas P. John vs. Cochin University of Science and Technology and others (2003(3) ILR 261 Ker.) In that case a prospectus was issued for admission to Engineering course in the Cochin University. The prospectus contained the fees structure of the candidates admitted to the courses. However the fees structure prescribed was higher than those prescribed for the immediately previous batch and the batch subsequently to the batch involved in the writ petition. There arose a question as to whether the fees prescribed is discriminatory in so far as different fees structure was prescribed for students based on the batch in which they were admitted. There also a contention was raised that since the students got admission based on the prospectus which was published in advance, they cannot after undergoing selection as per the prospectus, later turn round and challenge the fees structure as discriminatory. That question was dealt with the Division Bench as follows:

> 17. Mr.Kurian contends that the petitioners are estopped from challenging the rate of fee. They had applied for admission to the B.Tech course on the basis of the representation made in the prospectus. The fee structure had been clearly disclosed. They had accepted it. Thus, they are estopped from challenging it.
> 18. It is undoubtedly true that the University had issued a prospectus. The fee structure had been disclosed. The

petitioners had sought admission in pursuance to the stipulations made in the prospectus. However, it has to be remembered that estoppel is a principle of equity. Reference in this regard may

be made to the decision of their Lordships of the Supreme Court in Waman Shriniwas vs. R.B. and Company. It was clearly held by their Lordships that an agreement to waive an illegality is void on grounds of public policy and would be enforceable.

19. Mr.Thomas has also referred to the decision of their Lordships in Indira Bai vs. Nand Kishore wherein it was observed as under:

> " Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to said and law in administration of justice."

In the present case, invoking the rule of estoppel against the petitioners would lead to injustice and be wholly inequitable.

20. There is another aspect of the matter. No citizen can be denied equality before law. In the context of waiver of fundamental right their Lordships of the Supreme Court were pleased to observe as under in Basheshar Nath vs. I.T.Commissioner.

> "It is not open to a citizen to waive his fundamental rights conferred by Part III of the constitution. The Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights."

Thus even by their own volition , the petitioners could not have given up their right to parity of treatment with others who were similarly situated.

> 21. In view of the above, the second question is also answered against the respondents. It is held that the petitioners are not estopped form challenging the validity of the action of the respondents.

8. This decision squarely covers the facts of the case at hand. Therefore, I do not find any merit contention of the respondents that the petitioners cannot challenge the clause in the prospectus since the principle of estoppal applies.

9. Accordingly the writ petition is allowed declaring that clause VII (a) (4) of the prospectus is unconstitutional. Consequently, if the petitioners in these petitions are entitled to admission but for clause VIII (a)(4) the admission granted to them pursuant to the interim orders passed in these cases shall be regularised and they shall be continued to be permitted to undergo the course as if they were regularly admitted.

S.SIRI JAGAN, JUDGE.

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